PUBLIC PROSECUTOR

v.

PANG CHEE MENG

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG JC
[FT CRIMINAL TRIAL NO. 58-10-88]
18 AUGUST 1990

CRIMINAL PROCEDURE: *Statement by accused - Admissibility - No caution administered - Arrest - Conditions of s. 27 Evidence Act.*

The accused P was charged with the offence of trafficking heroin under s. 39B(1) of the Dangerous Drugs Act 1952 (the Act). The issue for determination was the admissibility of P's reply to PW1's question as to where the drugs were. The defence argued that as P had already been arrested and no caution had been issued under s. 37A of the Act, the statement was inadmissible. The prosecution relied on this statement "to prove possession and knowledge."

Held:

[1] (a) During PW1's testimony, the statement by P was ruled to be inadmissible on the ground that the caution had not been administered although P had been arrested.

(b) However when the prosecution later recalled PW1, the Court admitted the statement under s. 27 of the Evidence Act as all the conditions under s. 27 of the Evidence Act had been fulfilled. The information provided by P related distinctly to the drugs (which is a fact) being recovered - *Wai Chan Leong v. PP* followed.

[2] (a) On the issue of exclusive possession of the room in which the drugs were found (P's flat) the Court held that on the facts and evidence, P was the occupier of the room as he had care and management of same.

(b) As P had care, custody and control of the drugs found in the room, P is presumed to have knowledge of the nature of the drugs.

[Accused guilty.]

Case referred to:
Wai Chan Leong v. PP [1989] 1 CLJ (Rep) 171

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37A, 37(da), 39B(1)(a), (2)
Evidence Act 1950, s. 27

For the prosecution - Balia Yusof bin Hj. Mohd. Wahi
For the accused - P.G. Segran

JUDGMENT

James Foong JC:

The accused is charged under an amended charge which reads as follows:

> That you on 12 September 1987 at about 2.30 a.m. at house No.13F, Jalan Kalong, off Jalan Sungai Besi, in the City of Kuala Lumpur, in the Federal Territory did traffic in dangerous drug, to wit 353.86 grammes of heroin and that you have thereby committed an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) and punishable under s. 39B(2) of the same Act.

The facts of this case are as follows:

On 12 September 1987, at about 2a.m. one Inspector Kamaruddin (PW1) together with D/C Kabri, D/C Jaafar, D/C Abdul Rahman and D/C Disi waited in ambush at a car park along Jalan Kalong which is a road off Jalan Sungai Besi, Kuala Lumpur.

At about 2.30 a.m., the police party spotted a male Chinese coming out of a dark blue Honda car.

Just as the male Chinese alighted from the said car, the police party approached him.

Inspector Kamaruddin introduced himself as a police personnel and searched the body of this male Chinese identified as the accused. In his pockets he found a bunch of keys and a purse containing RM2,020. A search of his car was made and nothing suspected of drugs were found therein.

Inspector Kamaruddin then asked the accused "Di mana lu simpan itu dadah?" According to the evidence of Inspector Kamaruddin and D/C Kabri (PW6) the accused replied "Itu barang tidak ada kereta. Itu barang ada atas rumah." While the accused gave this reply he pointed towards the direction of the nearby building where he later brought Inspector Kamaruddin and his police party to the flat where he stayed.

This statement by the accused was vigorously argued upon by the accused's Counsel of being inadmissible for reason that at the material time, accused was already "arrested" and no caution under s. 37A of the Dangerous Drugs Act 1952 was administered to the accused. On this point I shall elaborate later in this judgment after completing the facts of this case.

The accused brought the police party to a 3 storey shop house, of which flat No. 13F, Jalan Kalong is situated therein.

On arrival the front grille gate was opened by the accused's sister Phang Sow Ying who was the landlady of the premises in which the accused rented a room indicated as room 'A' on the sketch plan (P23A - C).

According to Inspector Kamaruddin, accused showed the police party the door to his room which was locked and using the set of keys recovered from the accused at the car park, the accused opened the room door.

From where the accused pointed towards the direction of the corner of a bed, Inspector Kamaruddin recovered:

(a) a brown bag (P4) and inside this bag were 4 plastic packets wrapped in newspapers all containing pinkish gandular substance, suspected of drugs,

(b) and 3 T-shirts.

Underneath the bed and near the brown bag, Inspector Kamaruddin recovered a shoe box (P5) which contain therein:

(a) 14 smaller plastic packets containing substance suspected of drugs,

(b) a small weighing scale (P18A),

(c) cash of RM580 (P6) wrapped in newspaper,

(d) a spoon (P18B),

(e) a big plastic bag which contained many empty plastic packets (P8A).

All the above substances which were suspected of drugs were sent to the chemistry department. On analysis the substances were found to contain a nett weight of 353.86 grammes of heroin. The spoon (P18B) was also found to have traces of heroin.

The accused was brought back to the Cawangan Anti Dadah (CAD) headquarters and the next day he gave a cautioned statement which was tendered for admission by the accused. In this cautioned statement (P10), the accused stated that the drugs are not his but belonged to Ah Seng and Ah Fatt, friends of his whom he alleged to have shared the room A with.

The prosecution case relied mainly on 2 points:

(a) that the statement made by accused in reply to Inspector Kamaruddin's question "Di mana lu simpan itu dadah?" indicates that the accused was in possession and had the knowledge of the drugs and,

(b) that the drugs as pointed out by the accused were found in the room of the accused which the accused had care and control.

At this stage I would refer back to the statement "Itu barang tidak ada kereta, itu barang ada atas rumah" made by the accused in response to Inspector Kamaruddin's question, "Di mana lu simpan itu dadah?"

When these statements first arose at the testimony of Inspector Kamaruddin under examination-in-chief, I ruled that they were inadmissible for reason that the caution in s. 37A of Dangerous Drugs Act 1952 was not administered. I also ruled that the accused was under arrest at the time when the statement was made by the accused.

However, the learned Deputy Public Prosecutor recalled Inspector Kamaruddin at a later stage of which I allowed and, again this statement by the accused was introduced one more time. On this occasion the learned Deputy Public Prosecutor pointed out that he is now relying on s. 27 of the Evidence Act to admit these statements made by the accused to Inspector Kamaruddin's question.

After hearing submissions by both learned Deputy Public Prosecutor and accused's Counsel, I admitted the statements made by the accused to Inspector Kamaruddin's question.

Section 27 of the Evidence Act states as follows:

> When any fact is disposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.

In the case of *Wai Chan Leong v. PP* [1989] 1 CLJ (Rep) 171, Supreme Court has recently ruled that s. 27 of the Evidence Act "stands by itself" and both s. 27 of the Evidence Act and s. 37A of the Dangerous Drugs Act 1952 are "independent of each other and are valid in law".

Such being the case, even though the caution was not administered to the accused under s. 37A of the Dangerous Drugs Act, statements made by the accused even though it may amount to a confession is admissible under s. 27 of the Evidence Act provided all the conditions of s. 27 are being fulfilled.

Such being the law, I proceeded to examine whether the facts of this case warrant the admission of the said statement made by the accused under s. 27 of the Evidence Act.

The question asked by Inspector Kamaruddin is admissible because it is a statement made by him. He has come to this Court and testified that he did ask "Di mana lu simpan itu dadah?" There is no law to prevent him from asking this question. In fact, the accused himself testified that Inspector Kamaruddin did ask him this question.

As for the answer, I have to scrutinise it carefully. I find that the answer of the accused, "Itu barang tidak ada kereta. Itu barang ada atas rumah" is information which relates distinctly to the drugs, (which is a fact) being recovered. On this occasion, while giving this information, the accused was pointing towards the direction of his flat. Under such circumstances and being bound by the decision of *Wai Chan Leong v. PP* [1989] 1 CLJ (Rep) 171, I have to admit this information as evidence.

The challenge to this information of the accused has not ended after I have made my ruling on its admission. The accused testified on oath after being called to make his defence that, he did not give any such answer but agreed that the question "Di mana lu simpan itu dadah?" was put to him by Inspector Kamaruddin and which included the word "dadah".

I find that this bare denial as untruthful since there was also another witness D/C Kabri (PW6) who also testified that such a question was asked by Inspector Kamaruddin and accused answered in the manner stated above.

The accused also testified that he has little knowledge of Bahasa Malaysia and may not have understood what was asked. I find that the accused who has finished Form 3 (LCE Level) at a well known school, Cochrane Road School does understand simple Bahasa words such as "Di mana lu simpan dadah" and as a natural response at the material time he did answer the question of Inspector Kamaruddin in the manner as stated by Inspector Kamaruddin and PW6 while at the same time pointing to the premises where he stayed (the pointing was not denied by him) to the police party.

The accused admitted that he was the tenant to room A where the drugs were found. However, he denied that he was the sole occupant. The other occupants who shared the rental with him were Ah Seng and Ah Fatt. I find that existence of Ah Seng and Ah Fatt as the other co-tenants to the room difficult to believe on the following grounds:

(1) PW7, one Teh Thean Soo whom both prosecution and defence agreed to be an impartial witness testified that he himself (PW7) was a tenant to one of the rooms in the said premises No. 13F, Jalan Kalong. PW7 testified that he resided in the premises for almost a year and he had not seen or known of the existence of Ah Seng and Ah Fatt during his stay.

Though PW7 may not be at home all the time, but surely he would have met or known of the presence of Ah Seng and Ah Fatt whom accused alleged moved in with him to room A about 7 months before his arrest.

(2) Though in the cautioned statement the accused did mention the existence of Ah Seng and Ah Fatt, but up to the day he testified in Court, the accused could not provide any particulars of these 2 persons. Not even their full names, their addresses or where they work despite the fact the accused stated that he knew Ah Fatt more than 2½ years before his arrest.

(3) The accused did not call the sister Phang Sow Ying to testify despite the fact that this witness was offered to him by the prosecution. Phang Sow Ying being the landlady of the house would have thrown light to the existence of these 2 persons. The accused's

Counsel submitted that Phang Sow Ying was not called by the accused to testify because it is the duty of the prosecution to prove its case. I agree to that contention but once defence is called, accused must testify and support his contention with evidence both from witnesses or otherwise he is not guilty of the charge. Phang Sow Ying, in my opinion would have thrown light on whether Ah Seng and Ah Fatt existed.

(4) The accused also did not tender to this Court, any evidence, exhibits or otherwise of the existence of Ah Seng and Ah Fatt residing in the said room A. If Ah Seng and Ah Fatt had access to the said room and had resided therein, there could be some belongings of theirs. All these were not produced nor were there any other evidence of their existence except the statement of accused in the cautioned statement and while testifying in Court.

The accused's Counsel submitted that accused had no exclusive possession to the room A. Besides Ah Seng and Ah Fatt, accused's girlfriend one Hong Heng Sim also had access to the room. PW7, did testify that the accused's girl friend had been seen to go into the room of the accused by using keys of her own. I find that this may be the truth but it does not mean that accused is not the occupier or does not have custody or control of the things found therein.

The accused never testified that the drugs could have belonged to the girlfriend. He maintained that they were the properties of Ah Seng and Ah Fatt. If the accused had no care and control of the premises he would have testified that his girlfriend also had access to room A and could have placed the drugs there. However, this he did not maintain. The girlfriend from the evidence of accused himself and PW7, is not a person who "lived in" with the accused. She only comes occasionally to stay with the accused. From the evidence as a whole I find that the mere presence of the girlfriend in the accused's room occasionally does not mean that the accused had no exclusive possession of the same.

Deducing from the evidence aforesaid, I find that the accused was the occupier of room A for he had the care or management of the same. I also find that as he had the care, custody and control of the drugs found in the said room under s. 37(d) of the Dangerous Drugs Act 1952, the accused is presumed to have knowledge of the nature of the drugs and the accused has not rebutted this presumption.

Besides the aforesaid, I also find that the accused has admitted to the possession of the drugs when he replied to Inspector Kamaruddin's question "Di mana lu simpan dadah itu?"

Further, as the drugs heroin in this case exceeds 15 grammes in weight the accused is presumed to be trafficking in drugs under s. 37(da) of the Dangerous Drugs Act 1952 and of which the accused has not rebutted this presumption.

I therefore find the accused guilty of the amended charge.

Also found at [1990] 2 CLJ 1029